

**Aje Best-On Sdn Bhd v
Ahmad bin Omar & Anor**

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HIGH COURT (KUALA LUMPUR) — SUIT NO S2-22-159 OF 1998
KAMALANATHAN RATNAM J
7 JUNE 2000

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Civil Procedure — Appeal — Notice of — Delay in filing — Computation of time — Failure to extend time — Whether appeal ought to be dismissed — Interpretation Act 1948 s 54(1)(b)

The plaintiff had appealed against the decision of the senior assistant registrar ('the SAR') given on 6 April 1999. The defendants raised a preliminary objection that the notice of appeal, which was filed on 13 April 1999, was filed out of time. Pursuant to O 56 r 1(3) of the Rules of the High Court 1980 ('the RHC'), the notice of appeal ought to have been issued on or before 11 April 1999.

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Held, upholding the preliminary objection and dismissing the appeal with costs:

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Since the last date for filing the notice of appeal fell on the 11th being a Sunday, the court had to, pursuant to O 3 r 2(5) of the RHC, exclude the 11th from the computation and pursuant to s 54(1)(b) of the Interpretation Act 1948, include the next following day into the computation of the days to be counted for filing the notice of appeal. This means that the last day for filing the notice of appeal was 12 April 1999. Since the notice was filed on 13 April 1999 it was out of time. Furthermore, the plaintiff insisted on his calculation and did not seek the court's indulgence for an extension of time to file the notice of appeal (see pp 602H-603A, C).]

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[Bahasa Malaysia summary]

Plaintif telah membuat rayuan terhadap keputusan penolong kanan pendaftar ('PKP') yang diberikan pada 6 April 1999. Defendan-defendan telah menimbulkan satu bantahan awal bahawa notis rayuan, yang telah difailkan pada 13 April 1999, telah difailkan di luar had masa. Menurut A 56 k 1(3) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), notis rayuan tersebut sepatutnya dikemukakan pada atau sebelum 11 April 1999.

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Diputuskan, membenarkan bantahan awal tersebut dan menolak rayuan dengan kos:

Memandangkan tarikh akhir untuk memfailkan notis rayuan jatuh pada 11 haribulan iaitu hari Ahad, mahkamah telah, menurut A 3 k 2(5) KMT, mengecualikan 11 haribulan tersebut daripada dikira dan menurut s 54(1)(b) Akta Tafsiran 1948, mengambilkira hari berikutnya apabila membuat kiraan hari yang dibilang untuk

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- A memfailkan notis rayuan tersebut. Ini bermakna bahawa hari terakhir untuk memfailkan notis rayuan tersebut adalah pada 12 April 1999. Memandangkan notis tersebut telah difailkan pada 13 April 1999, maka ia adalah di luar had masa. Tambahan pula, plaintif berkeras dengan kiraan beliau dan tidak memohon kebenaran mahkamah untuk lanjutan masa bagi memfailkan notis rayuan tersebut (lihat ms 602H-603A, C).]
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Notes

- C For cases on notice of appeal generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 787-842.

Cases referred to

- D *Chern Yen Ming & Anor v Teng Ik Ngee Construction Sdn Bhd & Ors* (*Chern Boon Hong & Anor, Third Parties*) [1996] 4 MLJ 227 (refd)

Legislation referred to

- E Interpretation Act 1948 s 54(1)(b)
Rules of the High Court 1980 O 3 r 2(5), O 56 r 1(3)
Tieh Siaw Siong (Paul Ong & Associates) for the appellant/plaintiff.
S Maniarasan (Soh Hayati & Co) for the respondent/first defendant.

Kamalanathan Ratnam J:

F *Facts*

- G The plaintiff sued the defendants as guarantors on 12 March 1998 in respect of credit facilities given to one Euro Elegant Sdn Bhd for a sum of RM459,839.76 with interest and costs. The defendants entered appearance on 18 May 1998. The plaintiff then filed an application (encl 4) for summary judgment for the said sum on 16 June 1998. On 11 August 1998 when the said application came up for hearing, the defendants were ready to defend the application. The plaintiff then applied to withdraw encl 4 and the same was struck out with costs.

- H The plaintiff then refiled the same application for summary judgment against both the defendants (encl 8). In the meantime, the defendants filed their defence on 3 June 1998. Having heard arguments the learned senior assistant registrar ('the SAR') dismissed the plaintiff's application with costs on 6 April 1999.

The appeal

- I This is the plaintiff's appeal against that decision. Before me the defendants raised a preliminary objection having given prior notice to the plaintiff/appellant.

The preliminary objection

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The preliminary objection was that the notice of appeal, which was filed on 13 April 1999, was filed out of time. Order 56 r 1(3) of the Rules of the High Court 1980 ('the RHC') reads as follows:

- (3) Unless the Court otherwise order, the notice must be issued within five days after the judgment, order or decision appealed against was given or made and served not less than two clear days before the day fixed for hearing the appeal.

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The learned SAR's decision was given on 6 April 1999. Pursuant to O 56 r 1(3) of the RHC, the notice of appeal ought to have been issued on or before 11 April 1999. There is no evidence before me as to when the said notice was actually served on the defendants' solicitors. So I shall not consider this part of the rule.

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In *Chern Yen Ming & Anor v Teng Ik Ngee Construction Sdn Bhd & Ors (Chern Boon Hong & Anor, Third Parties)* [1996] 4 MLJ 227 the court, in allowing a similar preliminary objection held, in construing the meaning of the word 'issued' under O 56 r 1(3) of the RHC that it would be deemed issued when the notice of appeal to the judge in chambers was actually signed, sealed and dated, and that it is on that date that the court must construe that it is issued. I would accept this as correctly setting down the meaning of the word 'issued'. However, in so far as this case is concerned the notice of appeal was signed, sealed and dated, all on 13 April 1999.

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I have checked the calendar for the month of April 1999. The 6th day of April falls on a Tuesday and the 11th day of April, which is the last day for filing the notice of appeal, falls on a Sunday.

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It is relevant therefore now to consider O 3 r 2(5) of the RHC which reads as follows:

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- (5) Where, apart from this paragraph, the period in question, being a period of seven days or less, would include the day before the weekly holiday, the weekly holiday or public holiday, that day shall be excluded.

Section 54(1)(b) of the Interpretation Act 1948 ('the Act') is also relevant. It reads as follows:

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Computation of time

- (1) In computing time for the purposes of any written law —

...

- (b) if the last day of the period is a weekly holiday or a public holiday (referred to in this sub-s as excluded days) the period shall include the next following day which is not an excluded day; ...

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Therefore, it is clear from these two authoritative guidelines that since the last date for filing the notice of appeal falls on the 11th being a Sunday, then I shall have to, pursuant to O 3 r 2(5) of the RHC, exclude the 11th from the computation and pursuant to s 54(1)(b) of the Act, include the next following day into the computation of the days to be counted for filing the notice of appeal. This means that the last day for filing the notice of appeal

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A was 12 April 1999. Since the notice was filed on 13 April 1999, it is out of time.

B Counsel for the appellant argued that pursuant to O 3 r 2(5) of the RHC, I should, in computing the days, also exclude 'the day before the weekly holiday'. In other words, he wanted me to exclude the 10th day of April which was a Saturday from the computation. If he is correct in his submission then clearly he is on time when he filed the notice of appeal on 13 April. But that is not how this sub-r (5) is to be interpreted. Where the period to be calculated would include the day before the weekly holiday, then in computing the required number of days so long as it is seven days or less, the court ought not to exclude in its calculation, that day before the weekly holiday. In other words, in so far as this case is concerned, the court ought to include the Saturday in its calculation and which means that the required five days would end on Monday, 12 April 1999.

C Since the plaintiff insisted on his calculation and did not seek the court's indulgence for an extension of time to file the notice of appeal, I upheld the preliminary objection and dismiss the appeal with costs.

D *Preliminary objection upheld and appeal dismissed with costs.*

Reported by Ezatul Zuria Azhari

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